(9)

No. 02-964

Supreme Court, U.S.
FILED
AUG 14 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GEORGE H. BALDWIN,

Petitioner,

v.

MICHAEL REESE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

DENNIS N. BALSKE
KOIN Center, Suite 1600
222 S.W. Columbia
Portland, Oregon 97201
(503) 242-3831

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

62 pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Does a habeas corpus petitioner alert the state's court of last resort of the specific federal constitutional guarantee on which he bases his federal claim when: (1) by operation of state law the claim is by definition a federal claim; (2) under the law of the state's court of last resort, the identical legal standard is used to decide the state and federal claims; or (3) the state's statutes and rules ensure a fair opportunity to decide the claim?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. CONVICTION AND DIRECT APPEALS	1
B. POST-CONVICTION REVIEW	4
C. FEDERAL HABEAS CORPUS	6
D. THE NINTH CIRCUIT COURT OF APPEALS	8
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. MR. REESE EXHAUSTED HIS FEDERAL CONSTITUTIONAL CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY GIVING THE OREGON APPELLATE COURTS THE REQUIRED "FAIR OPPORTUNITY" TO ADDRESS IT	12
A. MR. REESE COMPLIED WITH *O'SULLIVAN* BY PRESENTING HIS FEDERAL CLAIM TO THE OREGON SUPREME COURT IN A PETITION FOR DISCRETIONARY REVIEW	13
B. MR. REESE MET THE STANDARD OF FAIR PRESENTATION ENUNCIATED IN *PICARD*, A STANDARD THAT *DUNCAN* LEFT UNCHANGED	16
1. Fair Opportunity Is the Key to Fair Presentation	16
2. A Fair Opportunity Arises When the Petitioner Presents the Substance of the Federal Claim	18

TABLE OF CONTENTS – Continued

	Page
II. EVEN IF *DUNCAN* ESTABLISHED A NEW STANDARD, MR. REESE MEETS ALL ITS REQUIREMENTS	22
A. *Duncan* and *Gray* Interpret *Picard*'s Fair Presentation Rule to Require Habeas Petitioners to Alert State Courts to Specific Constitutional Guarantees	23
B. A State Prisoner Properly Alerts a State Court to a Specific Federal Constitutional Guarantee Without Citing It by Number If: (1) By Operation of State Law the Claim Is by Definition a Federal Claim; (2) Under the Law of the State's Court of Last Resort, the Identical Legal Standard Is Used to Decide the State and Federal Claims; or (3) The State's Statutes and Case Law Ensure a Fair Opportunity to Decide the Claim	25
1. When Mr. Reese Claimed He Received "Ineffective Assistance," the Oregon Appellate Courts Were Alerted to the Federal Nature of the Claim by Operation of State Law	25
a. The State Concedes an Oregon Petitioner Alerts the State Courts to the Federal Nature of His Claim Without Citing the Federal Constitution or a Federal Case When He Alleges a Violation of a Specific Guarantee That Is Not Addressed by an Oregon Constitutional Provision	26

TABLE OF CONTENTS – Continued

Page

b. By Claiming He Received "Ineffective Assistance," Mr. Reese Alerted the Oregon Appellate Courts to the Federal Nature of His Claim 27

2. The Oregon Supreme Court Prescribes the Identical Test for Determining Ineffective Assistance of Appellate Counsel under the Oregon and United States Constitutions 29

3. Oregon Law Ensured That Mr. Reese Provided the Oregon Appellate Courts an Opportunity to Decide the Federal Claim Decided by the PCR Trial Court .. 35

a. Oregon's PCR Statutes Helped Ensure That Mr. Reese Fairly Presented His State and Federal Constitutional Claim 36

b. The En Banc Ninth Circuit Has Already Recognized the Narrowness of the Panel's Holding in Mr. Reese's Case 41

III. THE STATE HAS ABANDONED ANY DEFENSE THAT MR. REESE FAILED TO PRESENT SUFFICIENT FACTS TO THE OREGON APPELLATE COURTS 42

IV. NO NEW RULE IS REQUIRED TO DECIDE MR. REESE'S CLAIM 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adamson v. California, 332 U.S. 46 (1947) 26

Anders v. California, 386 U.S. 738 (1967) 3

Anderson v. Harless, 459 U.S. 4 (1982) 17, 19, 20

Artuz v. Bennett, 531 U.S. 4 (2000) 47

Blackledge v. Perry, 417 U.S. 21 (1974) 13

Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484 (1973) 17

Calderon v. Thompson, 523 U.S. 538 (1998) 47

Carey v. Saffold, 536 U.S. 214 (2002) 47

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) 21

Castro v. United States, 290 F.3d 1270 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 993 (2003) 47

Clay v. United States, 537 U.S. 522 (2003) 47

Coleman v. Thompson, 501 U.S. 722 (1991) 35, 48

Darr v. Burford, 339 U.S. 200 (1950) 17, 22

Davis v. Cain, 44 F. Supp. 2d 792 (E.D. La. 1999) 34

Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982) 21

DeBenedictis v. Wainwright, 517 F. Supp. 1033 (S.D. Fla. 1981) 34

Demarest v. Price, 130 F.3d 922 (10th Cir. 1997) 21

Duncan v. Henry, 513 U.S. 364 (1995) ..... *passim*

Duncan v. Walker, 533 U.S. 167 (2001) 47

Early v. Packer, 537 U.S. 3 (2002) 47

TABLE OF AUTHORITIES – Continued

Page

Edwards v. Carpenter, 529 U.S. 446 (2000) 9, 16, 18, 48

Engle v. Isaac, 456 U.S. 107 (1982) 44

Estelle v. Smith, 451 U.S. 454 (1981) 44

Evans v. Court of Common Pleas, 959 F.2d 1227 (3d Cir. 1992) 34

Faretta v. California, 402 U.S. 806 (1975) 2, 3

Fay v. Noia, 372 U.S. 391 (1963) 48

Felker v. Turpin, 518 U.S. 651 (1996) 47

Fitzgerald v. Racing Association of Central Iowa, 123 S. Ct. 2156 (2003) 34

Granberry v. Greer, 481 U.S. 129 (1987) 40, 41

Gray v. Netherland, 518 U.S. 152 (1996) 23, 24, 43

Hakeem v. Beyer, 774 F. Supp. 276 (D.N.J. 1991) 34

Harris v. Reed, 489 U.S. 255 (1989) 35

Henry v. Estelle, 33 F.3d 1037 (9th Cir. 1994) 20

Hohn v. United States, 524 U.S. 236 (1998) 47

Horn v. Banks, 536 U.S. 266 (2002) 47

Jenkins v. Anderson, 447 U.S. 231 (1980) 43, 44

Jones v. Barnes, 463 U.S. 745 (1983) 4, 12, 36

Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) 16, 17, 18

Lindh v. Murphy, 521 U.S. 320 (1997) 47

Lockyer v. Andrade, 123 S. Ct. 1166 (2003) 47

Lyons v. Crawford, 232 F.3d 666 (9th Cir. 2000) ... 7, 8, 9, 23

McCandless v. Vaughn, 172 F.3d 255 (3d Cir. 1999) 21

McMeans v. Brigano, 228 F.3d 674 (6th Cir. 2000) 21

TABLE OF AUTHORITIES – Continued

Page

Michigan v. Long, 463 U.S. 1032 (1983) 35

Miller-El v. Cockrell, 537 U.S. 322 (2003) 47

Nadworny v. Fair, 872 F.2d 1093 (1st Cir. 1989) 34

Nichols v. Sullivan, 867 F.2d 1250 (10th Cir. 1989) 21

North Carolina v. Pearce, 395 U.S. 711 (1969) 3

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) ..... *passim*

Odem v. Hopkins, 192 F.3d 772 (8th Cir. 1999) 21

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 34

Peterson v. Lampert, 319 F.3d 1153 (9th Cir. 2003) (*en banc*) 28, 29, 33, 34, 42

Picard v. Connor, 404 U.S. 270 (1971) ..... *passim*

Ramirez v. Attorney General, 280 F.3d 87 (2d Cir. 2001) 21

Rose v. Lundy, 455 U.S. 509 (1982) 17

Ex parte Royall, 117 U.S. 241 (1886) 16

Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) 34

Slack v. McDaniel, 529 U.S. 473 (2000) 47

Smith v. Goguen, 415 U.S. 566 (1974) 17, 19

Smith v. Robbins, 528 U.S. 259 (2000) 7, 44, 45, 46

Stone v. Powell, 428 U.S. 465 (1976) 33

Strickland v. Washington, 466 U.S. 668 (1984) 4, 17, 28

Strogov v. Attorney General of N.Y., 191 F.3d 188 (2d Cir. 1999) 34

Tamapua v. Shimoda, 796 F.2d 261 (9th Cir. 1986) 20

Thomas v. Gibson, 218 F.3d 1213 (10th Cir. 2000) 21

TABLE OF AUTHORITIES – Continued

Page

Trest v. Cain, 522 U.S. 87 (1997) 43

Turner v. Maass, 980 F.2d 738 (table), 1992 WL 354145 (9th Cir. Nov. 30, 1992) 31

Tyler v. Cain, 533 U.S. 656 (2001) 47

Ulster County Court v. Allen, 442 U.S. 140 (1979) 35

Vasquez v. Hillery, 474 U.S. 254 (1986) 19

Verdin v. O'Leary, 972 F.2d 1467 (7th Cir. 1992) 34

Webb v. Webb, 451 U.S. 493 (1981) 35

Wells v. Maass, 28 F.3d 1005 (9th Cir. 1994) 40

(Michael) Williams v. Taylor, 529 U.S. 420 (2000) 47

(Terry) Williams v. Taylor, 529 U.S. 362 (2000) 47

Wilson v. Briley, 243 F.3d 325 (7th Cir. 2001) 21

Woodford v. Garceau, 123 S. Ct. 1398 (2003) 47

Woodford v. Visciotti, 537 U.S. 19 (2002) 47

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 39

Young v. Ragen, 337 U.S. 235 (1949) 13

STATE CASES

Bernie v. State, 524 So.2d 988 (Fla. 1988) 33

Chew v. State, 121 Or. App. 474, 855 P.2d 1120 (1993) 28

Davis v. Armenakis, 151 Or. App. 66, 948 P.2d 327 (1997) 12, 37

Guinn v. Cupp, 304 Or. 488, 747 P.2d 984 (1988) 11, 18, 22, 30, 31

TABLE OF AUTHORITIES – Continued

Page

Krummacher v. Gierloff, 290 Or. 867, 627 P.2d 458 (1981) 4, 28

Long v. State, 130 Or. App. 198, 880 P.2d 509 (1994) 28

Press Inc. v. Verran, 569 S.W.2d 435 (Tenn. 1978) 33

Racing Association of Central Iowa v. Fitzgerald, 648 N.W.2d 555 (Iowa 2002) 34

State v. Balfour, 311 Or. 434, 814 P.2d 1069 (1991) ..... *passim*

State v. Hitz, 307 Or. 183, 766 P.2d 373 (1988) 40

State v. Jackson, 206 Mont. 338, 672 P.2d 255 (1983) 33

State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983) 29

State v. Reese, 114 Or. App. 557, 836 P.2d 737 (1992) 1

State v. Reese, 128 Or. App. 323, 876 P.2d 317 (1994) 1, 2

State v. Reese, 134 Or. App. 629, 894 P.2d 1268 (1995) 3

FEDERAL STATUTES

28 U.S.C. § 1257 35

28 U.S.C. § 2244 47

28 U.S.C. § 2253 47

28 U.S.C. § 2254 ..... 13, 16, 21, 47

28 U.S.C. § 2255 47

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, 110 Stat. 1214 47

TABLE OF AUTHORITIES – Continued

Page

STATE CONSTITUTIONS, STATUTES, AND RULES

Ala. Const. art. I, § 2 27
Ariz. Const. art. II, § 13 27
Ark. Const. art. II, § 18 27
Cal. Const. art. I, § 28(d) 33
Del. Const. art. I, § 11 27
Fla. Const. art. I, § 12 33
Ind. Const. art. I, § 23 27
Iowa Const. art. I, § 6 27
Ky. Bill of Rights, § 3 27
Ky. Bill of Rights, § 17 27
N.D. Const. art. I, § 21 27
Or. Const. art. I, § 10 40
Or. Const. art. I, § 11 ..... 4, 29, 31
Or. Const. art. I (Bill of Rights) 26
Or. Rev. Stat. § 138.640 ..... 8, 11, 37
Or. Rev. Stat. § 138.660 38
Or. R. App. P. 9.20 ..... 8, 16, 42
Pa. Const. art. I, § 13 27
R.I. Const. art. I, § 8 27
S.D. Const. art. IV, § 23 27
S.D. Const. art. VI, § 18 27
Tex. Const. art. I, § 3 27
Va. Const. art. I, § 4 27

TABLE OF AUTHORITIES – Continued

Page

Vt. Const. ch. I, art. 7 27
Wash. Const. art. I, § 12 27
Wash. Const. art. I, § 14 27

OTHER AUTHORITIES

David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988) 26

David Schuman, *A Failed Critique of State Constitutionalism,* 91 MICH. L. REV. 274 (1992) 27

Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon,* 49 OR. L. REV. 125 (1970) 26

Jennifer Friesen, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 3d § 3-1(b) (Lexis 2000) 26, 27, 28

Oregon State Bar Indigent Defense Task Force III Report (May 22, 2000 and January 12, 2001) 49

Randy Hertz and James S. Liebman, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 4th (Lexis 2000) 21

STATEMENT OF THE CASE

A. CONVICTION AND DIRECT APPEALS

In 1991, Mr. Reese was convicted on two counts of first-degree kidnaping and one count of first-degree attempted sodomy. He was sentenced to a thirty-year determinate sentence as a dangerous offender on each kidnaping count, to be served concurrently with each other. He was also sentenced to a thirty-six-month sentence for attempted sodomy, to be served consecutively to the kidnaping sentences.

Mr. Reese appealed. In *State v. Reese*, 114 Or. App. 557, 836 P.2d 737 (1992), the Oregon Court of Appeals affirmed the convictions but remanded the case for resentencing. The Court of Appeals held that the trial court should have indicated a presumptive sentence. 114 Or. App. at 560, 836 P.2d at 738-39. With such an indication, Mr. Reese would not necessarily serve the entire thirty-year sentence because, once a presumptive sentence is served, an inmate becomes eligible for consideration for release to post-prison supervision. *Id.*

Mr. Reese was resentenced on March 4, 1993. Represented by the same attorney who had represented him at trial and at the first sentencing, he was resentenced to thirty years imprisonment as a dangerous offender on the kidnaping convictions and to the same 36-month sentence for attempted sodomy. The court imposed a guidelines departure sentence as the presumptive term.

Mr. Reese again appealed. In *State v. Reese*, 128 Or. App. 323, 876 P.2d 317 (1994), the Oregon Court of Appeals again reversed and remanded the case for resentencing. It held that the "trial court was required to impose the presumptive sentence under the sentencing guidelines as the determinate part of its dangerous offender sentence,"

and it "failed to do so." 128 Or. App. at 326, 876 P.2d at 319.[1]

A different attorney was appointed to represent Mr. Reese at his resentencing. The resentencing proceeding took place with the attorney, but not Mr. Reese, present. After pronouncing the new sentence, the trial court had Mr. Reese brought to the courtroom. The court asked him whether he wanted his new lawyer to represent him. ER 84, CR 20, Ex. 1 at 16.[2] Mr. Reese stated, "I'll defend myself Your Honor," and explained why he did not want this new lawyer to represent him. *Id.* The court never explained to Mr. Reese any of the dangers and disadvantages of self-representation.[3] The court then asked the prosecutor whether he wanted to repeat the sentencing with Mr. Reese present. *Id.* The prosecutor opted for repeating the proceeding. *Id.* The court proceeded with the sentencing and, after the prosecutor presented his side, asked Mr. Reese if he wished "to say anything else on [his] behalf." *Id.* at 21.

The court then sentenced the unrepresented Mr. Reese to the identical sentence it set when Mr. Reese was not in the courtroom – a guidelines departure sentence of 260 months on each of the kidnaping convictions, to be served concurrently with each other, along with a thirty-six-month consecutive sentence for the attempted sodomy

[1] Under such a sentence, Mr. Reese would have become eligible for release to post-prison supervision in 121-130 months. *Id.*

[2] Ex. 1 is the record of Mr. Reese's second resentencing transcript, which was filed in the district court by Mr. Reese as an exhibit to his Memorandum in Opposition to Motion to Deny Habeas Corpus Relief.

[3] *See Faretta v. California*, 402 U.S. 806, 835 (1975) (accused must "be made aware of the dangers and disadvantages of self-representation").

conviction. To accomplish this result, the prosecutor dropped his request to sentence Mr. Reese as a dangerous offender. In this way, the court was able to avoid sentencing Mr. Reese to the "presumptive term" ordered by the Oregon Court of Appeals.

Mr. Reese appealed the second resentencing. He was appointed yet another lawyer. That lawyer did not raise either the vindictive sentencing, under *North Carolina v. Pearce*, 395 U.S. 711 (1969), or the *Faretta* violation. Instead, he filed a *Balfour* brief, the Oregon variant of an *Anders* brief.[4] A *Balfour* brief is filed when an appointed lawyer believes there are no issues of merit. Counsel prepares and signs a statement of facts and procedural history as Part A. Counsel then includes any issues that the appellant wishes to raise as Part B. This section is signed by the appellant.

Unlike the system described in *Anders*, the *Balfour* system does not require counsel to withdraw. Also unlike *Anders*, an Oregon appellate court presented with a *Balfour* brief does not engage in its own independent review of the entire record. *See State v. Balfour*, 311 Or. 434, 814 P.2d 1069 (1991).

The Oregon Court of Appeals affirmed without opinion. *State v. Reese*, 134 Or. App. 629, 894 P.2d 1268 (1995). Mr. Reese's *Balfour* counsel did not seek review by the Oregon Supreme Court, even though Mr. Reese requested him to do so in order that he could take his case "to federal court."[5]

[4] *Anders v. California*, 386 U.S. 738 (1967).

[5] He wrote his appointed counsel:

> In response to your last letter I have only the thoughts of taking my case all the way to the Oregon Supreme Court on

(Continued on following page)

B. POST-CONVICTION REVIEW

Mr. Reese then filed a petition for post-conviction relief (PCR), in which he alleged that he had received ineffective assistance from his appellate counsel. The PCR trial court appointed counsel for Mr. Reese. Counsel filed a first amended formal PCR petition raising the claim of ineffective assistance of appellate counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 11, of the Oregon Constitution. J.A. 17-18.[6]

The PCR court denied the ineffective assistance of appellate counsel claim, citing only federal authority. In its Memorandum of Opinion, beneath the heading titled "Adequate Appellate Counsel," the court simply wrote, "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983)." J.A. 23.[7]

---

appeal if this appeal is denied. This way I can take my case to federal court on post-conviction. We have come upon laws (Oregon) that states if one does not appeal to the Oregon Supreme Court then ones post-conviction will stay in the State of Oregon.

ER 84, CR 20, Ex. 2.

[6] Mr. Reese's *pro se* PCR petition referred neither to the Sixth and Fourteenth Amendments nor to the Oregon Constitution.

[7] Just above the court's decision on the appellate counsel claim was a separate heading entitled "Adequate Assistance of Counsel." Under that heading, the PCR court ruled, "Petitioner received adequate assistance of trial counsel," citing *Strickland v. Washington*, 466 U.S. 668, (1984), the leading federal precedent establishing the standard for ineffective assistance of counsel under the Sixth Amendment, and also citing *Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981), an Oregon case analyzing ineffective assistance claims under both the federal and Oregon Constitutions. J. A. 23.

Mr. Reese appealed. He was appointed still another counsel for the PCR appeal in the Oregon Court of Appeals. Mr. Reese's PCR appellate counsel filed a *Balfour* brief, just as Mr. Reese's direct appeal counsel had done. J.A. 27-41. For the section of the brief presenting the claims counsel thought without merit, counsel retyped Mr. Reese's *pro se* PCR petition rather than the amended petition that had been prepared by Mr. Reese's PCR attorney. J.A. 29-39. As a result, the *Balfour* brief did not explicitly cite to federal authority for the ineffective assistance of appellate counsel claim, as the amended petition had done. The state filed a motion for summary affirmance. The Oregon Court of Appeals granted the motion, summarily affirming the PCR court's decision without a written opinion. J.A. 42-43.

Mr. Reese then filed a petition for review in the Oregon Supreme Court. J.A. 44-51. He again alleged ineffective assistance of appellate counsel:

Statement of Legal Question(s) Presented on Review

Petitioner pleads several errors with respect to this case, including improper sentencing, *ineffective assistance of both trial court and appellate court counsel*, prosecutorial misconduct, improper waiver of jury and improper investigation.

Statement of reasons for reversal of Court of Appeals

The decision of the Court of Appeals should be reversed for the following reason: Petitioner was subject to several errors with respect to this case, including improper sentencing, *ineffective assistance of both trial court and appellate court counsel*, prosecutorial misconduct, improper waiver of jury and improper investigation.

Statement of Facts

> . . . Petitioner alleges trial court errors related to sentencing, in that the Petitioner received an unlawful dangerous offender sentence. Moreover, *Petitioner alleges claims of error with respect to* improper waiver of a jury trial, failure to provide a fair and impartial trial, improper resentencing, inadequate assistance of counsel, inadequate investigation and *inadequate appellate counsel*.

J.A. 47-48 (emphasis added).

The petition also raised the issue of ineffective assistance of trial counsel. It cited to the Sixth and Fourteenth Amendments of the United States Constitution in support, as follows:

> Moreover, since Petitioner asserts he was coerced and threatened by counsel to waive his right to trial by jury, Petitioner believes his 5th, 6th, and 14th Amendment rights have been violated.

J.A. 48. Mr. Reese did not cite the Oregon Constitution anywhere in his petition. Rather, in his Index of Authorities, he listed four separate provisions of the United States Constitution – the Fifth, Sixth, Eighth, and Fourteenth Amendments. J.A. 46.

The Oregon Supreme Court denied review.

C. FEDERAL HABEAS CORPUS

In his amended habeas corpus petition, Mr. Reese again alleged that his appellate counsel rendered ineffective assistance. The case was referred to a Magistrate Judge, who ruled that Mr. Reese had fairly presented his claim of ineffective assistance of appellate counsel. The Magistrate Judge recommended granting relief on that claim. Pet. Supp. App. 11-18.

The Magistrate Judge further ruled that the Oregon *Balfour* system is unconstitutional. Pet. Supp. App. 14-18. This Court then decided *Smith v. Robbins*, 528 U.S. 259 (2000). In response, the state moved the Magistrate Judge to reconsider her ruling. The Magistrate Judge reviewed further briefing from the parties and again ruled that the *Balfour* system is unconstitutional. Pet. Supp. App. 35-49.

The state objected to the Findings and Recommendation of the Magistrate Judge. It challenged the Magistrate Judge's conclusions that the *Balfour* system is unconstitutional and that Mr. Reese had fairly presented his claim of ineffective assistance of appellate counsel to the Oregon appellate courts.[8] The district court initially agreed with the Magistrate Judge, but ultimately overturned the Magistrate Judge's recommendation in response to the November 13, 2000, decision of the Ninth Circuit Court of Appeals in *Lyons v. Crawford*, 232 F.3d 666 (9th Cir. 2000). Pet. App. 33-36. Mr. Reese moved unsuccessfully for reconsideration. He then appealed to the Ninth Circuit Court of Appeals.

---

[8] The Magistrate Judge recommended that Mr. Reese be given a new direct appeal to challenge the third sentencing proceeding, at which he was unrepresented and received a 260-month sentence (compared to the 121-130-month presumptive sentence ordered by the Court of Appeals). Pet. Supp. App. 50. If this Court affirms the Ninth Circuit's ruling, Mr. Reese will still be required to (1) complete and win a new appeal in the Oregon courts to (2) obtain a new (fourth) sentencing, (3) obtain a proper presumptive sentence, and (4) convince the parole board he is worthy of post-prison supervision, in order to gain release under the presumptive sentence that should have been entered twelve years ago and that would have made Mr. Reese eligible for supervised release in 2002.

D. THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit reversed the district court's decision. In a section entitled, "Scope of *Lyons*," it reaffirmed that *Lyons*'s "requirement of explicitly presenting a federal claim must be satisfied at the highest levels of the state court system to ensure that possibilities of the state courts resolving federal issues relating to state prisoners have been truly exhausted." Pet. App. 12. The court also acknowledged the dictates of *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999):

> To exhaust a claim in the state courts, a habeas petitioner must, in addition to complying with *Lyons*, present that claim to the state's highest court, even if that court has discretionary control over its docket.

Pet. App. 13 (citing *O'Sullivan*, 526 U.S. at 845). It construed *O'Sullivan* to require a habeas petitioner to alert the highest state court to "the specifically federal nature of a claim in order to exhaust it." *Id.*

The court, applying relevant Oregon law, then determined that the Oregon Court of Appeals had been fairly presented with Mr. Reese's federal ineffectiveness of appellate counsel claim. Pet. App. 14-15; *see* Or. Rev. Stat. § 138.640 (1999); Or. R. App. P. 9.20(2). Citing this Court's decision in *Duncan v. Henry*, 513 U.S. 364, 365-366 (1995), the court determined that Mr. Reese fairly presented the issue to the Court of Appeals:

> To summarize our views: Reese raised the ineffective assistance of appellate counsel claim and cited federal authority in his petition to the PCR court. The PCR court cited only federal law in deciding the issue, and under Oregon law this means the claim was decided on federal grounds. Reese included the claim in his brief to the Oregon Court of Appeals, and the Oregon Court of Appeals summarily affirmed the PCR court's decision, which had been made on the basis of federal law. Based on these factors, we hold that the Oregon Court of Appeals "surely [was] alerted to the fact that [Reese was] asserting claims under the United States Constitution." *Duncan*, 513 U.S. at 365-66, 115 S. Ct. 887.

Pet. App. 15.

The court then addressed the issue of fair presentation to the Oregon Supreme Court. *Id.* at 16-19. Once again adhering to the dictates of *Duncan*, the court held that Mr. Reese met its fair presentation requirement because the Oregon Supreme Court had a fair opportunity to pass on his claims.

> The United States Supreme Court has explicitly explained that proper exhaustion requires a habeas petitioner to give the state "a fair opportunity to pass upon [his claims]." *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis in internal quotations omitted). *See also Lyons*, 232 F.3d at 668 ("to satisfy the exhaustion requirement of § 2254, habeas petitioners must 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and to correct alleged violations of its prisoners' federal rights.'" (quoting *Duncan*, 513 U.S. at 365, 115 S. Ct. 887)). Comity requires only that we do not rule if the state court has not had the *opportunity* first to hear federal habeas claims. Where opportunity existed, comity is not offended by an opportunity that the state foregoes.

Pet. App. 18 (emphasis by court).

SUMMARY OF ARGUMENT

This Court's cases make plain that Mr. Reese had two responsibilities. First, he had to present the substance of his federal habeas corpus claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Second, he had to "give the [Oregon] courts one full opportunity to resolve any constitutional issues by invoking one complete round of [Oregon]'s established appellate review process." *O'Sullivan*, 526 U.S. at 845.

The Ninth Circuit, however, demanded more. Citing *Duncan*, 513 J.S. at 365-366, it held that Mr. Reese was not only required to present the substance of his claim to the state's highest court, but was required to alert the court "to the specifically federal nature of the claim presented." Pet. App. 13. It concluded Mr. Reese met this more stringent standard. Whether or not this Court reads *Duncan* as requiring a more stringent standard, by virtue of Oregon law, Mr. Reese met it.

A state prisoner can sufficiently alert the state's highest court to the substance of his federal habeas corpus claim without citing, in that court, a specific provision of the federal Constitution, nor any federal cases. The state concedes as much. According to the state, "some claims may necessarily be federal where there is no state counterpart." Pet. Br. at 41.

In Oregon, there are three distinct ways that a habeas petitioner can alert the Oregon appellate courts to the federal nature of his claim without citing the federal Constitution or federal law. First, if a petitioner uses the federal term of art "ineffective assistance of counsel," a term the Oregon courts recognize as denoting a federal claim, he alerts the Oregon courts to the federal nature of his claim. Second, a petitioner provides an Oregon appellate court a fair opportunity to consider his federal claim if the standard used to decide the claim under the state and

federal Constitutions is identical. Third, if a PCR trial court decides an ineffectiveness claim solely on federal grounds, and the petitioner claims on appeal that he received ineffective assistance of appellate counsel, Oregon's PCR statutes and case law ensure that the Oregon appellate courts are provided a fair opportunity to decide the federal claim of ineffective assistance.

Mr. Reese's case fits all three criteria.

- When Mr. Reese claimed that he received "ineffective assistance of appellate counsel" in the Oregon appellate courts, J.A. 32, 47, those courts were alerted to the federal nature of the claim and had a fair opportunity to decide it because, under Oregon law, the term "ineffective assistance" federalizes the claim.
- Even if the Oregon Supreme Court failed to recognize the federal nature of the claim, it necessarily had to employ the same test to decide it, because under *Guinn v. Cupp*, 304 Or. 488, 495-96, 747 P.2d 984, 988-89 (1988), the Oregon Supreme Court employs only one standard to decide claims of ineffective assistance of *appellate* counsel, whether brought under the federal or Oregon Constitution or both. Thus, Mr. Reese gave the Oregon Supreme Court the fair opportunity that comity requires – an opportunity to apply its standard for ineffectiveness of appellate counsel, a unitary standard for claims under either the state or federal Constitution.
- Mr. Reese asserted in his petition for review by the Oregon Supreme Court, as one of his reasons for reversal, that he had received "ineffective assistance of appellate counsel." This was a direct challenge to the memorandum decision of the PCR trial court, a decision resting solely on federal law, pursuant to Or. Rev. Stat. § 138.640, by citing explicitly to a federal case in

deciding Mr. Reese's claim of ineffective assistance of appellate counsel.[9] The trial court's ruling on the federal claim was followed by a decision on the merits pursuant to Or. Rev. Stat. § 138.660 by the Oregon Court of Appeals, which "examin[ed] anew the [PCR] court's constitutional determinations." *Davis v. Armenakis*, 151 Or. App. 66, 69, 948 P.2d 327, 329 (1997).

For any of these reasons, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. MR. REESE EXHAUSTED HIS FEDERAL CONSTITUTIONAL CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY GIVING THE OREGON APPELLATE COURTS THE REQUIRED "FAIR OPPORTUNITY" TO ADDRESS IT.

Mr. Reese raised his federal constitutional claim of ineffective assistance of appellate counsel in a petition for post-conviction relief. J.A. 17. He appealed the denial of that petition, J.A. 20-26, to the Oregon Court of Appeals. J.A. 27-41. He then petitioned for review of the Court of Appeals's order of summary affirmance, J.A. 42-43, in the Oregon Supreme Court. J.A. 44-52. Mr. Reese thereby complied with *O'Sullivan*'s requirement that he invoke

[9] In its Ninth Circuit brief, the state conceded that the PCR court decided Mr. Reese's ineffective assistance of appellate counsel claim "on a federal ground" when the PCR court cited *Jones v. Barnes*, 463 U.S. 745 (1983). Resp. Br. at 20. The state has retreated slightly in its Brief to this Court, arguing that "the parties agree that Reese presented a federal claim of ineffective assistance of appellate counsel in the post-conviction trial court" and that the trial court ruled on at least part of that claim. Pet. Br. at 5.

"one complete round" of Oregon's appellate review process. 526 U.S. at 845. Additionally, Mr. Reese fairly presented the substance of his ineffective assistance claim, in accordance with the rule of *Picard v. Connor*, by requesting relief in the Oregon appellate courts, J.A. 32, 47-48, from the adverse decision of the PCR trial court, a decision which was rendered on explicitly and solely federal grounds, J.A. 17.

Mr. Reese thus did all that this Court has asked state prisoners to do in order to exhaust properly their federal constitutional claims in state court. The Ninth Circuit recognized as much. This Court should affirm the judgment of the Ninth Circuit.

A. MR. REESE COMPLIED WITH *O'SULLIVAN* BY PRESENTING HIS FEDERAL CLAIM TO THE OREGON SUPREME COURT IN A PETITION FOR DISCRETIONARY REVIEW.

The statute governing federal habeas corpus claims generally requires state prisoners to "exhaust[ ] the remedies available in the courts of the State" before bringing their claims to federal court. 28 U.S.C. § 2254(b)(1)(A).[10] This requirement "reflects a policy of federal-state comity." *Picard*, 404 U.S. at 275. Federalism and comity dictate that state prisoners do more than merely raise their federal claims once in state court. Rather, state prisoners

[10] There are exceptions to the exhaustion requirement. Exhaustion is not mandated if "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). *See also Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974); *Young v. Ragen*, 337 U.S. 235, 238-239 (1949).

must "give state courts a *fair* opportunity to act on their claims . . . by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 844-845 (emphasis in original). Mr. Reese complied with this requirement, and with the underlying mandate of comity, by raising his federal ineffective assistance of appellate counsel claim in such a manner that the operation of Oregon law made its federal nature plain to Oregon courts.

Although the Court extended the fair presentation requirement to discretionary review petitions in *O'Sullivan*, the Court's decision did not turn on the specifics of what constitutes fair presentation. In his petition for discretionary review by the Illinois Supreme Court, the prisoner in *O'Sullivan* abandoned three of the six claims he had presented to the Illinois Appellate Court. 526 U.S. at 841-842. Mr. Reese, by contrast, raised every claim he had made in the Oregon Court of Appeals before the Oregon Supreme Court, including the claim of ineffective assistance of appellate counsel. *Compare* J.A. 27-41 (PCR *Balfour* brief) *with* J.A. 44-51 (PCR petition for review). Mr. Reese therefore did all that the Court required in *O'Sullivan*.

The state, as shown by the phrasing of the question it presented to this Court on certiorari, makes a single argument: that Mr. Reese failed to describe specifically enough the federal contours of his claim in his petition for review by the Oregon Supreme Court. *See* Pet. for Cert. at i (twice limiting its invocation of this Court's case law to points concerning "the state's highest court").[11] Mr. Reese

[11] By its question presented, the state narrowed this Court's focus on the fair presentation made in Mr. Reese's petition for review to the Oregon Supreme Court. In its merits brief, however, the state reverts to

(Continued on following page)

contends that he complied with this Court's requirements at every step of the process, but the state is particularly mistaken in asserting he failed to follow this Court's clear and simple direction in *O'Sullivan*.

O'Sullivan simply required a proper presentation of federal claims, not a formulaic incantation of magic words. In explaining where it parted ways with the dissent, the *O'Sullivan* majority said that its

> disagreement with Justice Stevens in this case turns on our differing answers to the . . . question . . . whether a prisoner who fails to present his claims in a petition for discretionary review to a state court of last resort has *properly* presented his claims to the state courts.

526 U.S. at 848 (emphasis in original). The bulk of the Court's policy debate in *O'Sullivan* concerned the proper allocation of judicial resources. *Id.* at 845-848; *id.* at 857-862 (Stevens, J., dissenting); *id.* at 862-864 (Breyer, J., dissenting). The decision, in sum, was about the need to include state courts of last resort among those from which a state prisoner seeks relief before seeking it from a federal habeas court.

O'Sullivan was not a decision about any other point of law. It did not prescribe a formula petitioners must use when petitioning the highest state court for relief to satisfy the second *Picard* requirement that the federal claim's substance be made clear to the state courts. There

its previous position, rejected by the Ninth Circuit, that Mr. Reese failed to fairly present his claim to the Oregon Court of Appeals, as well as to the Oregon Supreme Court. Pet. Br. at 12, 42-43. Although this brief will principally focus on Mr. Reese's petition in the Oregon Supreme Court, it will also, to a lesser extent, address Mr. Reese's *Balfour* brief in the Oregon Court of Appeals.

was no dispute that Boerckel did not raise three of his issues in any fashion in the state's highest court. This Court was not asked, in *O'Sullivan*, to decide precisely how those claims should be raised in the state's highest court. That is the real question presented by Mr. Reese's case.

B. MR. REESE MET THE STANDARD OF FAIR PRESENTATION ENUNCIATED IN *PICARD*, A STANDARD THAT *DUNCAN* LEFT UNCHANGED.

Mr. Reese gave the Oregon Supreme Court an opportunity to decide his federal constitutional claim of ineffective assistance of appellate counsel by raising that claim – which had been raised in his *Balfour* brief to the Oregon Court of Appeals, *see* Or. R. App. P. 9.20(2), as well as in the post-conviction trial court – in his petition for review. In fact, he did more: he gave every level of the Oregon court system a *fair* opportunity to decide his federal constitutional claim, by presenting the substance of his claim to the Oregon courts.

1. Fair Opportunity Is the Key to Fair Presentation.

To exhaust a federal claim, a state prisoner must give the state courts a "fair opportunity" to decide it before bringing it to federal court. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *O'Sullivan*, 526 U.S. at 844; *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). This Court required habeas petitioners to exhaust their claims in state court long before the 1948 Judicial Code codified the exhaustion requirement now found at 28 U.S.C. § 2254(b)-(c). *Ex parte Royall*, 117 U.S. 241 (1886). The exhaustion doctrine is sufficiently central to habeas corpus procedure

that a federal habeas petition containing even one unexhausted claim – a "mixed petition" – must be dismissed if the petitioner will not amend it to delete that claim. *Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982).[12]

"The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent destruction of state judicial proceedings." *Rose*, 455 U.S. at 518 (citing *Braden v. 30th Judicial Circuit of Kentucky*, 410 U.S. 484, 490-91 (1973)). This Court has consistently held that the cornerstone of the exhaustion doctrine is petitioners' fair presentation of their federal constitutional claims to state courts. *Picard*, 404 U.S. at 275-276; *Smith v. Goguen*, 415 U.S. 566, 577 (1974); *Anderson v. Harless*, 459 U.S. 4, 7 (1982) (per curiam). More recent decisions clarifying aspects of the exhaustion requirement have adhered to this consistent holding. *Keeney*, 504 U.S. at 10; *Duncan*, 513 U.S. at 365-366; *O'Sullivan*, 526 U.S. at 848.

"Opportunity" is the word with which this Court has for decades defined the related terms "exhaustion" and "fair presentation." *See O'Sullivan*, 526 U.S. at 844; *Duncan*, 513 U.S. at 365; *Anderson*, 459 U.S. at 7; *Rose*, 455 U.S. at 518-519; *Picard*, 404 U.S. at 275; *Darr v. Burford*, 339 U.S. 200, 204 (1950). An opportunity is enough, so long as it is a fair opportunity, because "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard*, 404 U.S. at 275. State prisoners need not pad their state pleadings with every verbal formulation they can imagine using in a future federal habeas petition in order to assure that their state pleadings match their anticipated federal

---

[12] While "to be strictly enforced," however, the requirement is not jurisdictional. *Strickland*, 466 U.S. at 684.

pleadings with pinpoint accuracy. *Picard*, 404 U.S. at 278. Rather, a state prisoner is obligated only to give the state courts a "fair opportunity" to decide his federal claim before he brings it to federal court. *Edwards*, 529 U.S. at 453; *O'Sullivan*, 526 U.S. at 844; *Keeney*, 504 U.S. at 10.

Contrary to the state's assertion, the Ninth Circuit did not transform the fair presentation requirement into a fair opportunity requirement. Pet. Br. at 12. Rather, as can be seen from this Court's cases, fair presentation has always been synonymous with fair opportunity. In Mr. Reese's case, the Oregon state courts had a fair opportunity to decide his federal claim, because: (1) the Oregon PCR trial court chose to address it as a federal claim; (2) under Oregon law, the term "ineffectiveness" denotes a federal claim;[13] and (3) Oregon applies the same standard to determine claims of ineffective assistance of appellate counsel whether they are brought under the state or federal Constitutions, or both. *Guinn*, 304 Or. at 495-96, 747 P.2d at 988-89.[14]

2. A Fair Opportunity Arises When the Petitioner Presents the Substance of the Federal Claim.

The standard of what constitutes a fair opportunity was set in 1971 by *Picard* and has not changed. In *Picard*, prisoner Connor pressed on appeal a claim that his indictment was invalid on Fifth Amendment grounds. Following the denial of his appeals, he sought habeas relief in the District of Massachusetts. The District Court denied his petition. The First Circuit discovered on its own

[13] *See* § IIB(1)(b) at 27-29, *infra*.

[14] *See* § IIB(2) at 29-35, *infra*.

that there might also have been a Fourteenth Amendment equal protection problem. It ordered supplemental briefing on that point. In that supplemental briefing, Massachusetts complained that Connor had not exhausted the equal protection claim. The First Circuit held that the writ should be granted anyway. *Picard*, 404 U.S. at 271-274.

This Court reversed. The Court explained that it did so because respect for the principle of comity constrained it to hold "that the substance of a federal habeas corpus claim must be presented to the state courts." *Id.* at 278. In Connor's case, the state courts had not been provided with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Id.* at 277. The Court cautioned that by its decision – that a "claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination" – it was not implying that a habeas petitioner must raise his claim "by citing 'book and verse on the federal constitution.'" *Id.* at 278 (citations omitted).

This Court has cited the *Picard* requirement with approval time and again. For instance, in *Vasquez v. Hillery*, the Court held that expansion of the record in the district court does not create exhaustion problems so long as "the prisoner has presented the substance of his claim to the state courts." 474 U.S. 254, 257-258 (1986) (citing *Picard*, 404 U.S. at 278). In *Smith v. Goguen*, the Court found exhaustion when "the 'substance' of th[e] claim [at issue] was 'fairly presented' to the state courts under the exhaustion standards of *Picard*, [404 U.S.] at 275, 278 . . . " *Smith*, 415 U.S. at 577. And in *Anderson v. Harless*, the Court held that in order to see a claim adjudicated on the merits, a habeas petitioner "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." 459 U.S. at 7.

This Court relied on *Anderson* as well as *Picard* in *Duncan*, 513 U.S. at 366. On direct appeal, Henry had objected to what he termed a "miscarriage of justice" in violation of the California Constitution. In federal habeas, by contrast, Henry had raised a Fourteenth Amendment due process claim. The Court of Appeals found that Henry had exhausted his claim, explaining that to state such a claim "it is not necessary to invoke 'the talismanic phrase "due process of law."'" *Henry v. Estelle*, 33 F.3d 1037, 1040 (9th Cir. 1994) (quoting *Tamapua v. Shimoda*, 796 F.2d 261, 262-263 (9th Cir. 1986)); *Duncan*, 513 U.S. at 365.

This Court summarily reversed. Like Connor, Henry had erroneously been granted relief on the basis of a fundamentally different claim in federal court than he had made in state court. Unlike Mr. Reese, Henry had never once made plain the federal nature of his claim, relying instead on the California Constitution and its ambiguous "miscarriage of justice" standard. 513 U.S. at 365-366. In contrast, Mr. Reese exhausted his federal claim by requesting the Oregon Court of Appeals and the Oregon Supreme Court to reverse the adverse decision of the PCR trial court, a federal-law decision, complaining specifically of "ineffective assistance of appellate counsel." J.A. 32, 47.[15]

Duncan, a *per curiam* decision rendered without full briefing or argument, did not alter but only restated the law of exhaustion and fair presentation. The opinion made no lengthy inquiry into first principles, as had *Picard*. Rather, the *Duncan* Court held that *Picard* and *Anderson* "control[led] the outcome." *Id.* at 366. Although the Court suggested that exhaustion requires an explicit reference in

[15] *See* § IIB(1)(b) at 27-29, *infra*.

the state courts to the federal basis for the claim, the suggestion is *dicta*.[16]

Most circuit courts of appeal continue to follow *Picard*. Specifically, six of the eleven circuits overseeing § 2254 cases – the Second, Third, Sixth, Seventh, Eighth, and Tenth – use a "substance of the claim" test to determine fair presentation questions. *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (*en banc*); *Ramirez v. Attorney General*, 280 F.3d 87, 90, 94-95 (2d Cir. 2001); *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999); *Carter v. Bell*, 218 F.3d 581, 606-607 (6th Cir. 2000); *McMeans v. Brigano*, 228 F.3d 674, 681-682 (6th Cir. 2000); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001); *Odem v. Hopkins*, 192 F.3d 772 (8th Cir. 1999); *Nichols v. Sullivan*, 867 F.2d 1250, 1252-1253 (10th Cir. 1989); *Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997); *Thomas v. Gibson*, 218 F.3d 1213, 1221 n. 6 (10th Cir. 2000).

Mr. Reese complied with *Picard*'s clear rule as this Court has described that rule over and over. He presented the substance of his claim to the state courts. No more was required.

[16] "When the Court actually explained why it found the claim before it to be unexhausted, it did not rely exclusively on the petitioner's failure to make the federal law basis for the claim explicit in state court. Rather, the Court relied, in addition, on (a) the petitioner's failure in any *other* way to 'apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment' and (b) aspects of his state court pleadings that caused the state court 'understandably' to 'confine its analysis to the application of state law.'" Randy Hertz and James S. Liebman, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 4th § 23.3(c), at 976 (Lexis 2000) (footnotes omitted) (emphasis in original).

II. EVEN IF *DUNCAN* ESTABLISHED A NEW STANDARD, MR. REESE MEETS ALL ITS REQUIREMENTS.

Should the Court disagree and hold that *Duncan*'s *per curiam* summary reversal changed the preexisting law, creating a stricter standard than the one the Court has applied for more than a half century, *Darr*, 339 U.S. at 204, the Court should nevertheless affirm the Ninth Circuit's judgment. Oregon law ensured that the Oregon appellate courts were provided an opportunity to decide the federal claim decided by the PCR trial court – especially in light of the Oregon Supreme Court's standard for ineffectiveness of appellate counsel, which is the same whether a claim is brought under the Oregon or United States Constitutions or both. *Guinn*, 304 Or. 488, 747 P.2d 984.[17]

In seeking certiorari, the State asked this Court whether "a state prisoner 'alert[s]' the State's highest court that he is raising a federal claim when – in that court – he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis." The state now concedes, in its brief, that under the appropriate state law circumstances, the answer is "yes."

> Similarly, some claims may necessarily be federal where there is no state counterpart. For example, the Oregon Constitution does not contain a due process clause; a reference to a "due process violation" in Oregon courts necessarily alerts the state courts that a federal claim is being presented.

[17] A full discussion of *Guinn* appears in § IIB(2) at 29-35, *infra*.

Pet. Br. at 41. The state's concession that the Oregon courts need not be alerted by citation to a specific provision or case should extend to other situations in which Oregon courts are given an opportunity to decide federal claims when the federal claims are not expressly identified.

Mr. Reese's case presents just such a situation. The Oregon Supreme Court necessarily considered the federal ground of ineffective assistance of appellate counsel, previously decided by the state trial court, for three reasons. First, in Oregon, state courts recognize the use of the words "ineffective assistance" as denoting the federal nature of an ineffectiveness claim. Second, the standard used by the Oregon Supreme Court to decide such a claim is the same whether the claim is brought under the state or federal Constitution, or both. Third, Oregon's PCR statutes and case law provided the Oregon appellate courts with a fair opportunity to address Mr. Reese's federal ineffective assistance claim.

A. *Duncan* and *Gray* Interpret *Picard*'s Fair Presentation Rule to Require Habeas Petitioners to Alert State Courts to Specific Constitutional Guarantees.

In deciding whether Mr. Reese fairly presented his claim, the Ninth Circuit held that "a habeas petitioner must indicate to the state's highest court the specifically federal nature of a claim in order to exhaust it." Pet. App. 13. Relying on a previous circuit decision, *Lyons*, 232 F.3d at 669, the court held that a "petitioner can exhaust a claim only by both raising the claim and explicitly indicating the claim is a federal one." Pet. App. 13.

The importance of focusing on "a specific federal constitutional guarantee" was emphasized in *Gray v. Netherland*, 518 U.S. 152, 162-163 (1996).

> In *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509, 30 L.Ed.2d 438 (1971), we held that, for purposes of exhausting state remedies, the claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.[18]

The question in Mr. Reese's case then, is, what constitutes "reference to a specific federal constitutional guarantee"?

The answer necessarily depends on the bedrock for the exhaustion doctrine, the principle of comity. Comity provides the states with the first opportunity to enforce the federal Constitution. To honor comity is to respect state law practices for deciding whether a given constitutional claim is state, federal, or both. Oregon courts routinely understand particular terms of art established under federal law to invoke the protection of specific federal constitutional guarantees, even without citation of the federal constitutional provisions underlying those guarantees.

Mr. Reese both used the relevant terms of art and sought relief under a standard that is identical for both state and federal claims. Given the absence of explicit constitutional language, federal protection against ineffective assistance of counsel – much less ineffective assistance of appellate counsel – cannot be invoked under either *Picard* or *Duncan* by simply citing the Sixth Amendment or even its provision relating to a right to

---

[18] Although the *Gray* majority attributed this requirement to *Picard* rather than *Duncan*, *Picard* did not require "reference to a specific federal guarantee," but rather held that "the substance of a federal habeas corpus claim must first be presented to the state courts." 404 U.S. at 278.

counsel. The petitioner must necessarily say "ineffective assistance of counsel" and "appellate." Because Mr. Reese made those references, and because under Oregon law they invoke federal law, Mr. Reese gave the Oregon courts *more* notice of the precise federal claim he was raising than he could possibly have done by citing the underlying constitutional provision itself.

B. A State Prisoner Properly Alerts a State Court to a Specific Federal Constitutional Guarantee Without Citing It by Number If: (1) By Operation of State Law the Claim Is by Definition a Federal Claim; (2) Under the Law of the State's Court of Last Resort, the Identical Legal Standard Is Used to Decide the State and Federal Claims; or (3) The State's Statutes and Case Law Ensure a Fair Opportunity to Decide the Claim.

There are three categories of Oregon cases in which the Oregon courts are alerted to specific federal constitutional guarantees without specific citation to the federal Constitution or federal cases. The first is when, by operation of state law, the claim is by definition a federal claim.

1. When Mr. Reese Claimed He Received "Ineffective Assistance," the Oregon Appellate Courts Were Alerted to the Federal Nature of the Claim by Operation of State Law.

In Oregon, by operation of state law, a claim is by definition a federal claim: (1) when a habeas petitioner alleges a violation of a specific right that is not addressed by a state constitutional provision; and (2) when the

petitioner uses a term of art that alerts the court to the federal nature of the claim.

a. The State Concedes an Oregon Petitioner Alerts the State Courts to the Federal Nature of His Claim Without Citing the Federal Constitution or a Federal Case When He Alleges a Violation of a Specific Guarantee That Is Not Addressed by an Oregon Constitutional Provision.

The Oregon Constitution has neither an equal protection clause nor a due process clause.[19] Thus, as the state concedes, if an Oregon habeas petitioner claims in state court that his due process right to a fair trial was violated, the Oregon courts are alerted to a specific federal constitutional guarantee – a fair-trial guarantee arising under the Fourteenth Amendment due process clause – because there is no Oregon due process clause. Pet. Br. at 41; *Adamson v. California*, 332 U.S. 46, 53 n. 11 (1947). In determining whether to review such a case, the Oregon Supreme Court will, by definition, be alerted to the federal nature of the claim, and comity will be served.

Oregon is not alone. Many states do not have state constitutional provisions that correspond to those from the federal Constitution. For example, the constitutions of twenty-one other states lack equal protection clauses. Jennifer Friesen, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 3d § 3-1(b),

[19] Or. Const. art. I (Bill of Rights); *see* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988).

at 3-8 & n. 28 (Lexis 2000).[20] The constitutions of thirteen states besides Oregon do not contain the words "due process of law."[21] Six states prohibit "cruel" punishments but not "unusual" punishments.[22] In such states, the use of federal constitutional terminology pertaining specifically to the nonduplicated guarantee is sufficient to put the state courts on notice that a petitioner is pressing a federal claim.

b. By Claiming He Received "Ineffective Assistance," Mr. Reese Alerted the Oregon Appellate Courts to the Federal Nature of His Claim.

In Oregon, the distinction between the terms "inadequate assistance of counsel" and "ineffective assistance of counsel" is of legal moment. The former refers to a claim raised under the Oregon Constitution and the latter to a

[20] Twelve states, though having no equal protection clause, have an equal privileges and immunities clause akin to Oregon's. *See* Ala. Const. art. I, § 2; Ariz. Const. art. II, § 13; Ark. Const. art. II, § 18; Ind. Const. art. I, § 23; Iowa Const. art. I, § 6; Ky. Bill of Rights, § 3; N.D. Const. art. I, § 21; S.D. Const. art. VI, § 18; Tex. Const. art. I, § 3; Va. Const. art. I, § 4; Vt. Const. ch. I, art. 7; Wash. Const. art. I, § 12. Courts generally do not interpret equal privileges and immunities clauses to mean the same thing as equal protection clauses, however. David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 274-275 & nn. 7-10 (1992). Nine states lack even an equal privileges and immunities clause: Delaware, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, Oklahoma, Rhode Island, and Tennessee. Friesen, 1 STATE CONSTITUTIONAL LAW § 3-1(b), at 3-8 n. 28.

[21] Delaware, Georgia, Indiana, Kansas, Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, North Carolina, Texas, Vermont, and Wisconsin.

[22] *See* Del. Const. art. I, § 11; Ky. Bill of Rights, § 17; Pa. Const. art. I, § 13; R.I. Const. art. I, § 8; S.D. Const. art. IV, § 23; Wash. Const. art. I, § 14.

claim raised under the federal Constitution. Thus, in the trial-counsel context, the Oregon Court of Appeals has expressed its standards for decision as follows:

> In order to prove his allegation of *inadequate assistance* of trial counsel under the *Oregon* Constitution, petitioner must show that counsel failed to exercise professional skill and judgment, failed to diligently and conscientiously advance the defense and that the failure prejudiced his defense. *Krummacher v. Gierloff*, 290 Or. 867, 627 P.2d 458 (1981). To sustain his claim of *ineffective* counsel under the *federal* constitution, he must prove that, considering all the circumstances, counsel's assistance was unreasonable and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Chew v. State, 121 Or. App. 474, 477, 855 P.2d 1120, 1121 (1993) (emphasis added); *see also Long v. State*, 130 Or. App. 198, 201-202, 880 P.2d 509, 511 (1994) (quoting *Chew*'s delineation of the two standards with approval). Federal courts recognize the importance of honoring the Oregon courts' distinction between the standards. *See Peterson v. Lampert*, 319 F.3d 1153, 1155, 1158-1159 (9th Cir. 2003) (*en banc*) (finding claims unexhausted under *O'Sullivan* when, *inter alia*, petitioner claimed only "inadequate" assistance of counsel and cited only Oregon law before the Oregon Supreme Court). The state acknowledges this distinction. Pet. Br. at 4 n. 5.

Mr. Reese made his claim of ineffective assistance of appellate counsel under both the federal and Oregon Constitutions in his amended petition for post-conviction relief. J.A. 17. There, he labeled it a claim that he was

denied "adequate" assistance, in keeping with the state-law-first practice of the Oregon courts. *Id.*; *see State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983). In the same sentence, Mr. Reese cited the Sixth and Fourteenth Amendments. J.A. 17. This federalized his claim, as the state concedes. Pet. Br. at 5.

After the PCR trial court decided his ineffective assistance of appellate counsel claim on solely federal grounds, J.A. 23, Mr. Reese exhausted his federal claim by appealing it to the Oregon Court of Appeals and petitioning for review in the Oregon Supreme Court. Before those courts, Mr. Reese referred to his claim almost exclusively as a claim of "ineffective," not "inadequate," assistance. J.A. 32 (PCR appeal *Balfour* brief), 47-48 (PCR petition for review). The sole use of the phrase "inadequate assistance of counsel" came in the statement of facts section of Mr. Reese's PCR petition for review. J.A. 48. Unlike, for example, Peterson, Mr. Reese never cited any provisions of the Oregon Constitution anywhere in his *Balfour* brief or in his petition for review. *Cf. Peterson*, 319 F.3d at 1157.

2. The Oregon Supreme Court Prescribes the Identical Test for Determining Ineffective Assistance of Appellate Counsel under the Oregon and United States Constitutions.

The second category of cases where a state prisoner properly alerts a state court to a specific federal constitutional guarantee without citing it by number includes cases in which the state courts apply an identical legal standard to federal and state constitutional guarantees. Again, Oregon provides a good example. In Oregon, when a PCR petitioner raises a claim of ineffective assistance of appellate counsel, the Oregon Supreme Court applies the identical test to the claim under Article I, Section 11, of

the Oregon Constitution and under the Sixth and Fourteenth Amendments to the United States Constitution. *Guinn,* 304 Or. at 495-96, 747 P.2d at 988-89. In other words, in this instance as well as those in which the Oregon Constitution omits protections included in the federal Constitution, any right to relief is dependent upon federal law as interpreted by the Oregon Supreme Court. For an Oregon court to decide the claim is necessarily for it to decide a *federal* claim.

Whether or not the Oregon appellate courts understood the federal basis of Mr. Reese's claim, the *Guinn* standard ensures that they still had the same opportunity to decide it. In *Guinn*, the Oregon Supreme Court for the first and only time set the standard it would apply to claims of ineffective appellate representation. It did so in a case in which a PCR appellant raised the ineffectiveness of his direct appeal counsel under both the federal and state Constitutions. 304 Or. at 491, 747 P.2d at 986. In setting its single standard for determining adequate assistance of appellate counsel, the Oregon Supreme Court did not differentiate between the federal and state Constitutions. Rather, it set one standard for both.

> This court has not heretofore discussed *the standard* of conduct of appellate counsel in meeting the "adequate assistance of counsel" requirements of Article I, section 11, or the Sixth Amendment.

304 Or. at 495, 747 P.2d at 988 (emphasis added).

The *Guinn* Court only differentiated between the standards for trial and appellate counsel. In doing so, it emphasized the single "standard applicable to appellate counsel." *Id.* The court then articulated the standard it would employ under the state and federal Constitutions to determine the issue of ineffective appellate representation:

> A plaintiff seeking post-conviction relief stemming from a claim of inadequate assistance of appellate counsel for failing to assert a claimed error must establish (1) that a competent appellate counsel would have asserted this claim, and (2) that had the claim of error been raised, it is more probable than not that the result would have been different.

304 Or. at 496, 747 P.2d at 989. It then applied this standard to Guinn's *state and federal* claim of ineffective appellate representation and remanded the case to the PCR trial court for a determination of whether Guinn was prejudiced by his appellate counsel's failure to challenge Guinn's shackling in front of the jury. 304 Or. at 496-499, 747 P.2d at 989-990.[23]

Thus, although by operation of Oregon law the Oregon appellate courts were alerted to the federal nature of Mr. Reese's claim, the Oregon appellate courts would have not treated the claim any differently even had they not been so alerted. Mr. Reese gave the Oregon Supreme Court a fair opportunity to decide the ineffective appellate counsel claim under the one and only test employed by that court.[24]

---

[23] Guinn pled his claim as one of ineffective assistance: "the petitioner was denied the assistance of effective appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 11 of the Constitution of the State of Oregon." 304 Or. at 491, 747 P.2d at 986. The Oregon Supreme Court used the term "inadequate assistance" in setting its standard, even though it stated that the "ultimate issue" was whether "the defendant 'was denied the assistance of effective appellate counsel.'" 304 Or. at 494, 747 P.2d at 987.

[24] The Ninth Circuit, in an unpublished opinion, has recognized the equivalence of the state and federal standards for ineffective assistance of appellate counsel in Oregon under *Guinn*. *Turner v. Maass*, 980 F.2d 738 (table), 1992 WL 354145 at * 2 (9th Cir. Nov. 30, 1992).

The state argues that a ruling for Mr. Reese would burden the state courts to identify the federal nature of an ineffective assistance of counsel claim. Pet. Br. at 15-16. The state's argument misses the mark. The real burden is and has always been on habeas corpus petitioners to demonstrate that they fairly presented their claims. The state courts entertain the claims as they see fit. If a petitioner later chooses to challenge one of those rulings, the petitioner, not the state or state courts, must then demonstrate that he fairly presented the issue to the state courts.

More to the point, the Oregon courts were not burdened in Mr. Reese's case because, under the Oregon Supreme Court's own decision, the Oregon Supreme Court necessarily applies only one standard to claims of ineffective assistance of appellate counsel, whether the claim is brought under the state or federal Constitution, or both.

Amici Indiana et al. (state amici) advocate that in states that apply separate standards under their own constitutional provisions to constitutional claims, it is important for prisoners to alert those state courts that their claims are federal. General claims, argue the state amici, will not alert the state courts to the federal claim. State Amici Br. at 8. Oregon, however, is not such a state. In Oregon, where the Oregon Supreme Court applies the same test to determine all claims of ineffective appellate counsel, there is no need to alert the court to the federal nature of such a claim through citing particular federal sources. In Oregon, the claim is to be determined under the Oregon Supreme Court's unitary standard, whether the claim is brought under the state or federal Constitution, or both.

Oregon is not alone. Other states apply identical tests to federal and state constitutional claims. Since 1982, Florida has interpreted its state search and seizure clause

in conformity with the federal Fourth Amendment. *Bernie v. State*, 524 So.2d 988 (Fla. 1988) (construing Fla. Const. art. I, § 12); *see also* Cal. Const. art. I, § 28(d).[25] Montana interprets its state constitutional proscription of compelled self-incrimination identically to that contained in the federal Fifth Amendment. *State v. Jackson*, 206 Mont. 338, 672 P.2d 255 (1983). Some states even interpret differently worded state constitutional provisions in lockstep with federal analogues. *E.g., Press Inc. v. Verran*, 569 S.W. 2d 435, 442 (Tenn. 1978) (differently worded state free-expression provision equated to federal First Amendment in context of libel action). One of the foremost authorities on state constitutional law has noted:

> To the extent that a state court treats a [United States] Supreme Court opinion as the authoritative, rather than only persuasive, source for interpreting a particular state provision, the state provision becomes essentially superfluous. It follows that such judgments upholding rights, even if nominally based on state grounds, are not based on independent state grounds and are always vulnerable to Supreme Court review.

Friesen, 1 STATE CONSTITUTIONAL LAW § 1-6(b), at 1-44 (footnotes omitted).[26]

---

[25] Under *Stone v. Powell*, 428 U.S. 465 (1976), such search and seizure tests will not affect federal habeas corpus cases.

[26] Speaking of the right to effective assistance of *trial* counsel, the Ninth Circuit has noted, without deciding, the question "whether, after *Duncan*, citation of an identical or functionally identical state-law claim is sufficient to present a federal claim." *Peterson*, 319 F.3d at 1160. The *Peterson* court canvassed other appellate decisions, explaining that

> The Supreme Court in *Duncan* left open the question of what happens when the state and federal standards are not merely similar, but are, rather, identical or functionally identical. Several of our sister circuits had held, before

(Continued on following page)

This Court has held that when state courts declare they will "'apply the same analysis in considering . . . state [constitutional] claims as . . . in considering [a] federal [constitutional] claim,'" the Court will "consider a state-court decision as relying upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald v. Racing Association of Central Iowa*, 123 S. Ct. 2156, 2158-2159 (2003) (quoting *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d 555, 558 (Iowa 2002), and citing *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n. 4 (1990) ("no adequate and independent state ground where the court

---

Duncan, that presenting a state-law claim that is functionally identical to a federal claim is sufficient to present fairly the federal claim. *See Scarpa v. DuBois*, 38 F.3d 1, 7 (1st Cir.1994) ("[P]resenting a state-law claim that is functionally identical to a federal-law claim suffices to effectuate fair presentment of the latter claim." (citing *Nadworny v. Fair*, 872 F.2d 1093, 1099-1100 (1st Cir.1989))); *Verdin v. O'Leary*, 972 F.2d 1467, 1476 (7th Cir.1992) (holding that when "facts *and* legal theory are the same," presentation of the state claim suffices to present the federal claim and that placing the burden on the petitioner to demonstrate the "clonal relationship" is appropriate); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-1233 (3d Cir.1992) (holding that where the test for insufficiency of evidence is the same under Pennsylvania and federal law, failing to refer to federal law did not foreclose proper exhaustion); *see also Strogov v. Attorney Gen. of N.Y.*, 191 F.3d 188, 192 (2d Cir.1999) (noting the possibility of proper exhaustion if a petitioner raised a federal claim in his habeas petition "functionally equivalent" to a state-law claim presented in state court).

319 F.3d at 1160. At least three district courts have held claims to have been fairly presented in similar circumstances. *See Davis v. Cain*, 44 F. Supp. 2d 792, 795-796 (E.D. La. 1999); *Hakeem v. Beyer*, 774 F. Supp. 276, 283-284 (D.N.J. 1991), *vac'd on other grounds*, 990 F.2d 750 (3d Cir. 1993); *DeBenedictis v. Wainwright*, 517 F. Supp. 1033, 1035-1036 (S.D. Fla. 1981).

says that state and federal constitutional protections are 'identical'") and *Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983) ("jurisdiction exists where federal cases are not 'being used only for the purpose of guidance' and instead are 'compel[ing] the right'")). The state acknowledges the parallels between certiorari review of state-court decisions and the law of exhaustion and procedural default, as this Court frequently has done. *See Coleman v. Thompson*, 501 U.S. 722, 729-730 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979). *See* Pet. Br. at 44 n. 24 (citing 28 U.S.C. § 1257 and *Webb v. Webb*, 451 U.S. 493, 500-501 (1981)).

This Court should not curtail its own appellate, as well as habeas corpus, jurisdiction, by refusing to consider challenges to state court decisions premised on a federal constitutional standard invoked as a matter of state law by the use of a federal term of art. To limit this Court's authority and responsibility to enforce the Sixth Amendment, where the prisoner has complained of "ineffective assistance of counsel," would be to erect a hypertechnical obstacle to litigants who gave the state a full and fair opportunity to correct the constitutional error.

3. Oregon Law Ensured That Mr. Reese Provided the Oregon Appellate Courts an Opportunity to Decide the Federal Claim Decided by the PCR Trial Court.

Mr. Reese gave the Oregon courts a fair opportunity to address his federal constitutional claim of ineffectiveness of appellate counsel by asking the Oregon Court of Appeals and Supreme Court to review the PCR trial-court order denying his claim on a federal ground. The state correctly notes that Mr. Reese's post-conviction appellate filings did not cite the federal Constitution nor any federal cases in regard to his claim. But this is not premise enough for the

conclusion that Mr. Reese failed to "alert," Pet. for Cert. at i, the Oregon courts that it was indeed a federal claim he was making. To reach that conclusion, the state must, ironically, ignore the very policy of respect for state-court procedural rules that undergirds the exhaustion doctrine in the first place.

Again, the way that Mr. Reese alerted the Oregon courts to the federal nature of his claim was by seeking review of the summary affirmance of the PCR trial court's adverse decision of his claim, a decision based solely on federal grounds. However advantageous it might have been as a matter of appellate advocacy, it was unnecessary for Mr. Reese to cite further federal authority to exhaust his claim, because the operation of Oregon law ensured that the Oregon Court of Appeals and Oregon Supreme Court would consider the grounds for decision below. Those grounds were, in turn, so starkly federal that no reviewing court could have mistaken them for state-law grounds.

a. Oregon's PCR Statutes Helped Ensure That Mr. Reese Fairly Presented His State and Federal Constitutional Claim.

Mr. Reese's first amended petition for post-conviction relief claimed that Mr. Reese was being unlawfully confined because, in pertinent part, he "was denied adequate assistance of appellate counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 11, of the Constitution of Oregon." J.A. 17. The PCR trial court disagreed. Under the heading "Adequate Appellate Counsel," it wrote simply that "Appellate counsel need not present every colorable issue. *Jones v. Barnes*, 463 U.S. 745 (1983)." J.A. 23. This was in keeping with Oregon law, which provides that a

PCR court denying a petition for relief must enter an order "stat[ing] clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided." Or. Rev. Stat. § 138.640. By citing only a federal case, the PCR trial court was explaining that it had "decided" a "federal question" rather than "a state . . . question, or both."

The same Oregon statute that directs PCR trial courts to issue memoranda of opinion further provides that such a memorandum of opinion "shall constitute a final judgment for purposes of appellate review." *Id.* Further, the PCR court's judgment explicitly incorporated its memorandum of opinion, stating that "It is hereby adjudged that, based on the Court's Memorandum of Opinion, petitioner's Petition for Post-Conviction Relief is denied and this action is dismissed." J.A. 25.

Mr. Reese appealed this final judgment. On appeal, the Oregon Court of Appeals "examine[s] anew the [PCR] court's constitutional determinations." *Davis v. Armenakis*, 151 Or. App. at 69, 948 P.2d at 329. Newly appointed counsel advised Mr. Reese that he would not brief any arguments or any issues for him, but rather that Mr. Reese would be required to file a *Balfour* brief. Mr. Reese did so.

The record does not disclose whether Mr. Reese or his appointed counsel selected Mr. Reese's *pro se* post-conviction petition, rather than the first amended post-conviction petition that was ruled upon by the PCR trial court, as Section B of the *Balfour* brief. Either way, Section B, inserted by Mr. Reese's counsel, contained a claim for relief entitled "Second Claim for Relief: Ineffective Assistance of Appellate Counsel." J.A. 32. Under this claim, Mr. Reese complained that his direct appeal counsel had refused to file a petition for review on direct appeal. *Id.*

Moreover, he continued to insist that his direct appeal counsel had refused to raise valid issues. He argued:

> Mr. Jesse Wm. Barton did fail to raise issues on appeal. The prosecuting Attorney's did state in their Brief that I the defendant did fail to raise the issues in my arguments. It is not that I the defendant failed to raise the arguments but that this Attorney failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction.

Id.

The state did not respond to Mr. Reese's PCR appeal by filing a brief of its own, but rather moved for summary affirmance. This triggered Or. Rev. Stat. § 138.660, which provides:

> In reviewing the judgment of the circuit court in a [post-conviction] proceeding . . . the Court of Appeals on its own motion or on motion of respondent may summarily affirm, after submission of the appellant's brief and without submission of the respondent's brief, the judgment on appeal without oral argument if it finds that no substantial question of law is presented by the appeal.

The Court of Appeals granted the state's motion. J.A. 42-43.

The same statute continues by providing that "[a] dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal." Or. Rev. Stat. § 138.660. The Oregon Court of Appeal's decision on the "merits" of the PCR court's "judgment" must therefore have been based on an examination of that judgment, which is to say of the PCR trial court's memorandum of opinion, where the federal nature of Mr. Reese's claim is made plain.

Mr. Reese then filed a petition for review by the Oregon Supreme Court. There, he "contend[ed] that the Court of Appeals decision [was] wrong," J.A. 48, again assigning as error that he was not granted relief despite the fact that he had been prejudiced by "ineffective assistance of . . . appellate court counsel," J.A. 47. To evaluate whether or not the Court of Appeals's decision was "wrong," the Supreme Court must have examined that decision. Seeing that it was a bare order of summary affirmance, the Supreme Court must further have looked to the trial-court judgment it affirmed, which judgment in turn incorporated the memorandum of opinion indicating the federal nature of Mr. Reese's ineffective assistance of appellate counsel claim. This parallels the "look through" doctrine developed by this Court in federal habeas corpus cases to determine whether a state law decision is based on a state procedural ground or on its merits. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991).[27]

That Oregon courts undertake review of this nature is not idle speculation. In its lead case on the preservation of error in a criminal case, the Oregon Supreme Court explained that it had

---

[27] The Ninth Circuit may or may not have had *Ylst* somewhere in the back of its mind, as the state suggests that it did, when it decided Mr. Reese's appeal. *See* Pet. Br. at 26-27. Since the Ninth Circuit did not cite *Ylst*, the question raised by the state as to the propriety of the Ninth Circuit's purported reliance on it is at any rate impossible to resolve. Mr. Reese cites *Ylst* not to address how *Ylst* guides federal courts, but rather to illustrate the considerations that most likely guided the Oregon Supreme Court: that "many formulary orders are not meant to convey *anything* as to the reason for decision," and hence that it is safest to presume that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803 (emphasis in original).

> previously drawn attention to the distinctions between raising an *issue* at trial, identifying a *source* for a claimed position, and making a particular *argument*. The first ordinarily is essential, the second less so, the third least . . . [A]n . . . important justification for requiring preservation of claims of error, consistent with the directive to administer justice "completely," Or. Const. Art. I, § 10, is fairness to the adversary parties, and courts can avoid taking parties by surprise by inviting memoranda on inadequately briefed questions. Efficient procedures are instruments for, not obstacles to, deciding the merits, particularly when the alternative is a criminal conviction that lacks a basis in law or in fact.

State v. Hitz, 307 Or. 183, 188-189, 766 P.2d 373, 375-376 (1988) (emphasis in original). As in *Hitz*, "[t]he state was not ambushed or misled or denied an opportunity to meet [Mr. Reese]'s argument in this case." *Id.* at 189, 766 P.2d at 376. Rather, Mr. Reese passed the *Hitz* test with flying colors by not only raising the issue of ineffective assistance but also, in his PCR petition, clearly identifying its federal constitutional source. J.A. 17.

The Ninth Circuit, which is of necessity especially familiar with the details of Oregon appellate procedure, *cf. Granberry v. Greer*, 481 U.S. 129, 136 n. 9 (1987), has had occasion to give a long, reasoned analysis of how the relevant Oregon appellate rules work. That court concluded that the Oregon Supreme Court is an expansive examiner of issues on review. *Wells v. Maass*, 28 F.3d 1005, 1009-1010 (9th Cir. 1994).[28]

---

[28] "The Oregon Supreme Court retains the power to address claims which are not raised in the petition for review, and it has exercised this power on multiple occasions." *Wells*, 28 F.3d at 1010.

Consistent with *Granberry's* policy of deferring to circuit courts of appeals' interpretations of their states' appellate procedures, this Court should give deference to the Ninth Circuit's interpretation of Oregon procedures. That court's interpretation explains why Mr. Reese provided the Oregon Supreme Court a fair opportunity to decide his federal constitutional claim of ineffective assistance of appellate counsel.

> We conclude that it is appropriate to presume that, when faced with a summary affirmance from the Oregon Court of Appeals, the Oregon Supreme Court would have read the PCR court's substantive decision. Any other conclusion would not do credit to the appellate review process. For whatever variations may be appropriate under discretionary state procedures, an appellate court cannot fairly review a decision without knowing its content.

Pet. App. 17. Even if the Oregon Supreme Court chose to deny review without reviewing the only written opinion in Mr. Reese's case, comity was served in that case because "that court has chosen not to take advantage of an opportunity provided, and the interests of comity are no longer at issue." *Id.* at 19.

b. The En Banc Ninth Circuit Has Already Recognized the Narrowness of the Panel's Holding in Mr. Reese's Case.

The state responds to these contentions by arguing that the Ninth Circuit "announced a rule that dramatically departs from the fair presentation requirement" in Mr. Reese's case. Pet. Br. at 17; *see also id.* at 21, 22, 26. To Mr. Reese's knowledge, the only new rule involved in this case is the rule proposed by the state in its brief. Rather, the Ninth Circuit's decision in Mr. Reese's case involved a

strict interpretation of exhaustion and fair presentation law, followed by an exhaustive factual analysis. The court announced no rule.

This conclusion is bolstered by the Ninth Circuit's *en banc* decision in *Peterson*, a decision reached after the panel decision in Mr. Reese's case. The court's analysis demonstrates that *Reese* did not announce a new rule. Rather, the contrast between Mr. Reese's case and Peterson's vividly demonstrates how Mr. Reese fairly presented his federal claim, while Peterson did not.

In *Peterson*, the *en banc* court distinguished Mr. Reese's case from Peterson's, concluding that Peterson had not fairly presented his ineffective assistance of trial counsel claim to the Oregon appellate courts. 319 F.3d at 1157. It based its conclusion on the critical difference between the two cases: whereas in Mr. Reese's case, "the Oregon Supreme Court would have been alerted that the claim for ineffective assistance of appellate counsel was decided and affirmed on the basis of federal law," in Peterson's case, "he specifically and exclusively alleged a violation of his right to 'adequate' assistance of counsel under the Oregon Constitution" in his petition for review. *Id.* Therefore, although the Ninth Circuit relied on Oregon Rule of Appellate Procedure 9.20 to hold that Mr. Reese's federal claim was fairly presented, Rule 9.20 "was not enough to alert the Oregon Supreme Court that Peterson was seeking review of the federal issue he had presented to the Oregon Court of Appeals." *Id.*

III. THE STATE HAS ABANDONED ANY DEFENSE THAT MR. REESE FAILED TO PRESENT SUFFICIENT FACTS TO THE OREGON APPELLATE COURTS.

The state argues that Mr. Reese's factual presentation to the Oregon appellate courts was insufficient. Pet. Br. at 42-43. The state did not present such an argument to the

Ninth Circuit, a point it concedes: "[t]he State and the Ninth Circuit have treated the problem in this case primarily as a question whether, in state court, Reese identified his ineffective appellate counsel claim as a federal claim." Pet. Br. at 42, n. 22. Although the state initially defended on this theory in the district court, Reply Memorandum in Response to Petitioner's Amended Petition, Docket No. 38 at 6-8,[29] the state abandoned this aspect of its defense once the Magistrate Judge issued a recommendation in Mr. Reese's favor. The state instead focused its defense on Mr. Reese's failure to "present his ineffective appellate counsel claim as a federal question to Oregon's Court of Appeals because his brief to that court did not even mention the federal constitution or any other body of federal law." Objections to Findings and Recommendations (Amended), Docket No. 54 at 2.[30] Since then, as articulated in the question presented by the state, the focus of this litigation has been on whether Mr. Reese was required to add the word "federal" to his claim of ineffective assistance of appellate counsel in the Oregon Supreme Court. Pet. for Cert. at i.[31]

"Procedural default is normally a 'defense' that the state is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Trest v. Cain*, 522 U.S. 87, 89 (1997) (citing *Gray*, 418 U.S. at 166, and *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980)). The Court made the same point two decades earlier: "in

---

[29] Referenced at J. A. 3.

[30] Referenced at J. A. 5.

[31] *See also* Pet. Br. at 41 ("a state prisoner could identify a federal claim through an accepted short-hand reference without expressly identifying the federal constitutional provision, such as 'my federal right to effective counsel'").

some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 124 n. 26 (1982) (citing *Estelle v. Smith*, 451 U.S. 454, 468 n. 12 (1981) and *Jenkins*, 447 U.S. at 234 n. 1). The state did not preserve this aspect of its defense. Rather, it abandoned it by failing to raise it in the Ninth Circuit.

Even if the state had not abandoned this argument, Mr. Reese's factual claim was sufficient to fairly present his claim. The state agrees that "Reese presented a federal claim of ineffective assistance of appellate counsel in the post-conviction trial court." Pet. Br. at 5. In its Ninth Circuit brief, it also agreed that the PCR trial court decided the claim "on a federal ground." Resp. Br. at 20.

In his first amended post-conviction petition, Mr. Reese challenged his direct appeal counsel's failure to "raise issues that had been preserved for appeal." J.A. 17. The PCR trial court denied the claim on the merits, citing *Jones v. Barnes*. J.A. 23. When Mr. Reese appealed, his post-conviction appellate counsel followed the lead of direct appeal counsel by filing a *Balfour* brief. Mr. Reese, left to fend for himself, did his best in his second *Balfour* brief to spell out his claims. He argued that his direct appeal counsel "did fail to raise issues on appeal," denied that he [Mr. Reese] "fail[ed] to raise the issues in my arguments," and asserted that counsel "failed to raise the issues for me as I asked stating that I was to raise the issues on Post-Conviction." J.A. 32.

The state of Oregon should not gain an advantage as a result of its *Balfour* system, a system found unconstitutional by the Magistrate Judge before and after this Court's decision in *Smith v. Robbins*. Pet. Supp. App. at 18; Pet. Supp. App. at 47-48. Under *Balfour*, direct appeal and post-conviction appeal counsel can refuse to present any arguments on an inmate's behalf without moving to

withdraw and without identifying any potential issues for review. Pet. Supp. App. at 42. The inmate then must, on short notice, attempt to present legal arguments. No one determines whether the lawyer should be permitted to do this. There is no independent review of the record by the appellate courts. *Id*; *cf. Smith v. Robbins*, 528 U.S. at 282-283.

In reversing the district court's determination that Mr. Reese did not properly exhaust his state remedies, the Ninth Circuit found it unnecessary to review the constitutionality of the *Balfour* system. Pet. App. at 8 n. 6. This Court need not do so, either. In setting out the parameters of fair presentation, however, the Court should require states to provide a fair system to inmates to enable them to fairly present their federal issues to the state courts. It should further acknowledge that Oregon's system contains a fatal flaw when the issue in dispute is effective assistance of appellate counsel.

First, the system encourages ineffective assistance on direct appeal by allowing counsel, by simply claiming the "appeal is frivolous," to simply refuse to present any argument on behalf of the client. Pet. Supp. App. 42. Second, it fails to protect the inmate's federal constitutional right to counsel, because the direct appeal court does not review counsel's determination. *Id.* Moreover, the direct appeal court does not independently review the record – a record of a mere 25 pages in Mr. Reese's case. Such a review would have disclosed that Mr. Reese was initially sentenced *in absentia* and then resentenced without counsel and without warnings of the dangers of self-representation.[32] Third, it permits the identical

[32] *See* recap of sentencing proceedings at 2, *supra*.

process to repeat itself when, as here, the PCR appeal lawyer is permitted to thrust a second *Balfour* brief on the inmate, again with no checks and balances.[33]

In sum, Mr. Reese raised his claim under both the state and federal Constitutions. The PCR court decided the claim on federal grounds only. Thereafter, in his *Balfour* brief and petition for review, Mr. Reese realleged the identical claim – that he had received ineffective assistance of appellate counsel. Unlike Peterson, Mr. Reese never reasserted any state constitutional violation. Rather, he challenged the ruling of the PCR trial court, a ruling made solely on federal grounds. He thereby exhausted his claim.

IV. NO NEW RULE IS REQUIRED TO DECIDE MR. REESE'S CLAIM.

If this Court meant its *dicta* in *Duncan* to be the law, it need only say as much. It need not craft a new rule – the one proposed by the state, the one proposed by the Criminal Justice Legal Foundation (CJLF), or any other. If the Court chooses to reaffirm its *Duncan* decision or chooses to craft a new rule, it should nevertheless recognize that there are situations in which state courts are fairly presented with federal claims, even when the petitioner does not specifically refer to the constitutional guarantee.

Numerous considerations caution against a new rule. Every new rule, however straightforward, exacts its price in a flurry of increased litigation. The changes to federal

[33] "A comparison between Oregon's procedure under *Balfour* and those previously considered by the United States Supreme Court, particularly California's *Wende* procedure at issue in *Smith*, demonstrates that Oregon's *Balfour* procedure does not afford adequate and effective appellate review for criminal indigents." Pet. Supp. App. 47.

habeas law wrought by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, 110 Stat. 1214, for example, have generated eighteen cases in seven years in this Court alone (some of which, of course, have addressed multiple significant AEDPA questions), not to mention countless lower court decisions.[34]

[34] *See Felker v. Turpin*, 518 U.S. 651 (1996) (effect of the AEDPA on the power of this Court to grant an original writ of habeas corpus, whether the AEDPA is an unconstitutional restriction on the jurisdiction of this Court, and whether the AEDPA is a suspension of the writ in contravention of Art. I, § 9, cl. 2 of the Constitution); *Artuz v. Bennett*, 531 U.S. 4 (2000), *Duncan v. Walker*, 533 U.S. 167 (2001), *Carey v. Saffold*, 536 U.S. 214 (2002) (addition of statute of limitations to 28 U.S.C. § 2244, *see* AEDPA § 101, 110 Stat. at 1217); *Clay v. United States*, 537 U.S. 522 (2003) (addition of statute of limitations to 28 U.S.C. § 2255, *see* AEDPA § 105, 110 Stat. at 1220); *Hohn v. United States*, 524 U.S. 236 (1998), *Slack v. McDaniel*, 529 U.S. 473 (2000), *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (changes in 28 U.S.C. § 2253 regarding certificates of appealability, *see* AEDPA § 102, 110 Stat. at 1217-1218); *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000), *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003) (new standard of review in 28 U.S.C. § 2254(d), *see* AEDPA § 104(3), 110 Stat. at 1219); *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000) (new provision on effect of failure to develop facts in state proceedings in 28 U.S.C. § 2254(e)(2), *see* AEDPA § 104(4), 110 Stat. at 1219); *Felker*, 518 U.S. 651, *Calderon v. Thompson*, 523 U.S. 538 (1998), *Slack*, 529 U.S. 473, *Tyler v. Cain*, 533 U.S. 656 (2001) (new limitations on second or successive applications for habeas relief in 28 U.S.C. § 2244(b), *see* AEDPA § 106(b), 110 Stat. at 1220); and *Lindh v. Murphy*, 521 U.S. 320 (1997), *Woodford v. Garceau*, 123 S. Ct. 1398 (2003) (applicability of AEDPA to various classes of cases based on when the cases were filed). Yet another AEDPA case is now pending in this Court. *Castro v. United States*, 290 F.3d 1270 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 993 (2003) (When a lower court recharacterizes a federal prisoner's post-conviction motion as a § 2255 petition, does that render the prisoner's subsequent attempt to file a § 2255 petition a "second or successive" petition for AEDPA purposes?).

Moreover, contrary to the state's assertion, a new rule will not benefit state prisoners. Pet. Br. at 39. Despite the Court's best attempts to keep habeas corpus law simple and straightforward, that is no longer possible. Habeas corpus law is complex.

> Although the question, like the majority's opinion, is written with clarity, few lawyers, let alone unrepresented state prisoners, will readily understand it. The reason lies in the complexity of this Court's habeas corpus jurisprudence – a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure. Today's decision unnecessarily adds to that complexity.

Edwards, 529 U.S. at 454 (Breyer, J., concurring). This conclusion is bolstered by the CJLF's amicus brief, which expends thirty pages attempting to capture the complex interplay between the exhaustion and procedural default rules and proposing a six-pronged rule of its own. CJLF Br. at 28-29.

The best evidence that habeas corpus law is complex is the fact that most prisoners and their lawyers cannot figure out how to comply with it. Although a large number of exhaustion questions may come before the courts, undoubtedly the vast majority of those claims are lost by inmates. They are not lost because prisoners and their counsel can count on sympathetic habeas corpus principles to allow them to proceed through the courts, absent deliberate bypass.[35] Those days are long gone. Prisoners do not intentionally fail to exhaust their state remedies. Rather, prisoners and their counsel, wary of many perceived traps, simply cannot avoid them. Whether the

[35] *See Fay v. Noia*, 372 U.S. 391 (1963), overruled by *Coleman*.

prisoners and their counsel can eventually catch up on the learning curve to grasp the procedural complexities of habeas corpus practice, any changes in the present law will make it that much more difficult for prisoners to grasp and comply with it, whether the rule on its face seems simple or not.[36]

[36] The Court should not consider this question in a vacuum. Rather, it should take into account the differences between the state and defense bars. In Oregon, for example, cases are prosecuted by local district attorneys' offices. After that point, all state and federal litigation is prosecuted by one central agency, the Oregon Department of Justice. One office litigates state court appeals, state post-conviction trials and appeals, and federal habeas corpus cases. In contrast, there is a clear separation in the defense bar for federal and state court practice. Local public defenders, contractors, and private counsel defend cases at the trial level. Indigent direct appellants then go through the Office of the State Public Defender. If the direct appeal is unsuccessful, a private practitioner, usually a state contractor, is appointed to assist with the post-conviction litigation. If that is unsuccessful, in most instances, a different private practitioner or contractor is appointed to assist with appellate litigation. If that litigation is unsuccessful, the prisoner himself is required to file a *pro se* federal habeas corpus petition, after which, in most instances, the Federal Public Defender is appointed to represent the petitioner. This decentralization of the defense bar puts it at a grave disadvantage with respect to exhaustion of state remedies – so much so that an Oregon State Bar Task Force recently found that "no remedy short of a statewide entity" will correct the problem and recommended "the model of the centralized unit that currently exists within the Oregon Department of Justice" to solve the problem. *See* Oregon State Bar Indigent Defense Task Force III Report at 16 (May 22, 2000 and January 12, 2001) (available at http://www.osbar/2practice/idtf3/intro.html (accessed August 6, 2003)). The lawyers conducting state court trials, appeals, and post-conviction matters do not handle habeas corpus litigation. Although it might seem reasonable that these lawyers should learn how to preserve their clients' federal claims, the reality that they do not is disclosed by the numerous exhaustion cases lost by petitioners day in and day out in the federal courts.

Finally, there is no "significant social cost of concern to the States" in this case. Pet. Br. at 37. According to the state:

> Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Id. These societal costs are not at risk here. Mr. Reese is only seeking a new state-court appeal, not from the results of his trial, but from the results of his third sentencing. If he is successful in convincing this Court to affirm the Ninth Circuit's ruling, he will first be required to win his appeal before he can obtain a fourth sentencing. Then, if he can convince the trial court to sentence him as previously ordered by the Oregon Court of Appeals, to a 121-130-month presumptive sentence, he will be required to face an additional hurdle, the Board of Pardons and Parole. If the Board is then convinced he is releasable, he will be released to post-prison supervision. Because more than 130 months have already passed since his initial sentencing, he will hardly receive a windfall if he prevails.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 14th day of August, 2003.

DENNIS N. BALSKE
Attorney for Respondent